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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 529

NORTHERN PACIFIC RAILWAY COMPANY,
A CORPORATION,
Appellant,

v.

STATE OF WASHINGTON,
Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON.

STATEMENT AS TO JURISDICTION ON APPEAL.

D. F. LYONS,
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STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellant, in support of the jurisdiction of the Supreme Court of the United States to review the above entitled cause on appeal, respectfully represents:

A.

Statutory Provision Sustaining Jurisdicton.

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States is Judicial

Code, § 237 (a) (28 U. S. Code, § 344), reading, to the extent relevant here, as follows:

> "Section 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision could be had * * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. * * *."

The remedy by writ of error under the foregoing section, has been abolished and an appeal substituted.

Act of January 31, 1928, as amended by the Act of April 26, 1928; 45 Stat. 54; 45 Stat. 466 (28 U. S. Code, §§ 861a, 861b);

Nashville, etc., Ry. v. *White*, 278 U. S. 456, 460;

Great Northern Ry. Co. v. *Minnesota*, 278 U. S. 503, 506;

Larson v. *South Dakota*, 278 U. S. 429, 432.

B.

Statute of the State the Validity of Which is Involved.

The statute of the State of Washington, the validity of which has been sustained by the Supreme Court of the State of Washington, the highest court of said State, as not being violative of or repugnant to the provisions of the Constitution and Laws of the United States, is Chapter 191, Session Laws of 1933, State of Washington. The pertinent provisions thereof are:

> "Chapter 191.
>
> (S. H. B. 92.)
>
> Occupation Tax.
>
> An Act relating to taxation; imposing taxes upon the privilege of engaging in business activities and providing for the ascertainment, assessment, collection

and distribution thereof; providing for the administration and enforcement of this act; providing penalties, making appropriations; and declaring that this act shall take effect immediately.

Be it Enacted by the Legislature of the State of Washington:

Section 1. For the purposes of this act unless otherwise required by the context:

* * * * * * *

(6) The term 'gross income' means the value proceeding or accruing from the sale of tangible property, real or personal, or service or both and all receipts, actually received by reason of the investment of the capital of the business engaged in, including interest, discount, rentals, royalties, fees or other emoluments however designated and without any deduction on account of the cost of property sold, the cost of materials used, labor costs, interest or discount paid or any other expenses whatsoever and without any deduction on account of losses; *Provided,* The term 'gross income' shall not include any payments received on accounts or notes outstanding at the time this act goes into effect.

* * * * * * *

Sec. 2 (2) From and after the first day of August, 1933, and until the thirty-first day of July, 1935, there is hereby levied and there shall be collected from every person an annual tax or excise for the privilege of engaging in business activities. Such tax or excise shall be measured by the application of rates against values, gross proceeds of sales, or gross income, as the case may be, as follows:

* * * * * * *

(e) Upon every person engaging or continuing within this state in the following businesses; as to such

persons the amount of tax or excise shall be equal to the gross income of the business multiplied by the rate set out after the business, as follows:

* * * * * * *

III. Steam railways: One and one-half per cent;

* * * * * * *

Sec. 3. If any person shall engage or continue in any business or the performance of any function for which a privilege tax is imposed by this act, he shall be deemed to have applied for and to have duly obtained from the State of Washington a license under this act to engage in and to conduct such business or perform such function for the current tax year, upon the condition that he shall pay the tax accruing to the State of Washington under the provisions of this act; and he shall hereby be duly licensed to engage in and conduct such business or perform such a function.

* * * * * * *

Sec. 6. The taxes imposed hereunder shall be due and payable in monthly installments on or before the fifteenth day of the month next succeeding the month in which the tax accrued. The taxpayer, on or before said fifteenth day of the month, shall make out a return, upon such forms and setting forth such information as the tax commission may require, showing his estimate of the amount of the tax for which he is liable for the preceding month, sign and transmit the same to the tax commission, together with a remittance for said amount in the form required by section 20 of this act. Whenever the total tax for which any person is liable under this act does not exceed the sum of ten dollars ($10.00) for any month, a quarter-yearly return and remittance in lieu of the monthly return may be made on or before the fifteenth day of the month next succeeding the end of the quarter-year for which the tax is due. Whenever the total tax for which any person

is liable under this act does not exceed the sum of ten dollars ($10.00) for any quarter-year an annual return and remittance in lieu of the quarterly return may be made as provided in section 7 of this act. The tax commission, for good cause shown, may extend the time for making and filing any monthly or quarterly return as required under this section, and may grant such reasonable additional time within which to make and file such return as it may deem proper; but the time for making and filing such return shall not be extended beyond the fifteenth day of the month next succeeding the regular date of the return."

C.

Date of Judgment and Date of Application for Appeal.

The date of the final judgment of the Supreme Court of the State of Washington sought to be reviewed is September 6, 1935.

The judgment of the Supreme Court of the State of Washington was a judgment reversing the judgment of the trial court holding the aforesaid Chapter 191 unconstitutional. The judgment of the Supreme Court of Washington directed the Superior Court to enter judgment in favor of appellee and against appellant for $36,116.22. This judgment of the Supreme Court of the State of Washington is a final judgment within the meaning of Judicial Code, § 237.

Gulf Refining Co. v. *U. S.*, 269 U. S. 125.

The time for taking the appeal began to run on the date of such final judgment, to-wit, September 6, 1935. (See *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, where the time for appealing from the judgments of the Supreme Court of the State of Washington is considered.)

The date on which the application for appeal was presented and the appeal allowed is September 13, 1935.

D.

Nature of Case and Rulings Below.

The nature of the case and the rulings below which are deemed to bring the case within the jurisdictional provision relied on are as follows:

On February 28, 1934, appellee, State of Washington, brought suit against petitioner in the Superior Court for Thurston County, to recover $37,717.38 (and costs, interest and penalties), alleged to be the amount due as an occupation tax due plaintiff under the provisions of Chapter 191, Session Laws of Washington for 1933, for the period from August, 1933, to December, 1933, inclusive.

Appellant answered denying that any amount was due, and affirmatively alleging that its railroad within the State of Washington was constructed long prior to enactment of said Chapter 191 at a cost of more than one hundred million dollars to provide adequate facilities for both interstate business and intrastate business; that under the Constitution and laws of Washington it is compelled to do intrastate business, from which it cannot withdraw while continuing to carry on its interstate business; that the expense of doing intrastate business is in excess of the revenue received therefrom, and the intrastate business is necessarily conducted at a loss which must be borne by income from interstate business.

Appellant alleged that its interstate business and intrastate business is inseparably commingled and mutually dependent; that both classes of business are transported over the same lines of railroad in the same trains, operated by the same employes and with the same facilities; that it is not possible, practically and economically or at all, to carry intrastate business separately from interstate business by different instrumentalities or employes; that in a typical year (1933) income from appellant's intrastate business in

Washington totaled $5,802,530.12, and income from its interstate business in Washington totaled $6,262,424.20; that abandonment of intrastate business in order to escape the tax would result in annual loss on interstate business in Washington of $7,098,796.01 and destruction of an essential instrumentality of interstate commerce and of the value of appellant's property.

Appellant alleged that Chapter 191 as applied to it violates Article I, Section 8 and the due process clause of the 14th Amendment to the Constitution of the United States, and is null and void.

The Superior Court found the facts as alleged by appellant and concluded that Chapter 191, in its requirement of a license, making of reports and payment of a tax of 1½% of gross income from intrastate business for the privilege of engaging therein is, in practical operation and effect, to impose conditions and levy a tax upon the right to do both interstate business and local business and violates the commerce clause; and because the local business is conducted at a loss, the tax necessarily falls directly upon income from appellant's interstate and foreign business and income earned in other states, not subject to the tax, and therefore violates the due process clause of the 14th Amendment as well as the commerce clause. Judgment was accordingly entered dismissing the action with prejudice.

The Supreme Court of Washington on August 13, 1935, filed its opinion in which it overruled and denied all appellant's contentions predicated on the stated provisions of the federal constitution, reversed the judgment below and ordered judgment in favor of the state and against appellant in the sum of $36,116.22. The opinion and judgment which the Supreme Court rendered and entered are not and could not have been rendered or entered without denying to appellant all of the rights asserted by it under said constitutional provisions and said opinion and judgment are not

and cannot be rested upon any independent non-federal grounds.

The opinion of the Supreme Court of Washington, (83 Wash. Dec. —), is in part as follows:

"* * * * * * *

"The next and, as we view it, the important and difficult question is whether the tax may be collected, even though the railway company, the respondent, may not be able to retire from its intrastate business without also discontinuing its interstate. In this connection, it will be assumed (a) that the respondent cannot, as a matter of law, retire from its intrastate business; (b) that it is impractical, as a matter of fact, for it to retire from its intrastate business without also retiring from its interstate; and (c) that the intrastate or local business is conducted at a loss which is taken care of by the receipts from the interstate business. Giving effect to these assumptions, inquiry must be directed then to whether the tax is valid, even though the railway company may not be able to retire from its intrastate business without retiring from its interstate, and that the intrastate business is conducted at a loss.

* * * * * * *

"Even though the respondent in this case cannot retire from its intrastate business without also retiring from its interstate business, we think that the excise tax imposed upon the gross income from the intrastate business is not such a direct burden upon interstate commerce as to require that the tax be held void."

* * * * * * *

The dissenting opinion of Justice Steinert, concurred in by Justice Holcomb, contains the following:

"* * * * * * *

"The authorities cited in the prevailing opinion established beyond question, as I view it, that the state

may not impose a tax, no matter what its nature or variety may be, that has the effect of burdening or interfering with interstate commerce.

* * * * * * *

"* * * Under these cases, one of the essentials to the validity of a tax is that the one who is taxed could discontinue its intrastate business without also withdrawing from its interstate business.

* * * * * * *

"* * * That the action of the state will interfere with interstate commerce is, to me, very apparent.

* * * * * * *

"* * * It is, therefore, a burden upon, and interferes with, interstate commerce, and for that reason is invalid.

"I therefore dissent."

The final judgment of the Supreme Court of the State of Washington was entered on the 6th day of September, 1935.

E.

Cases Believed to Sustain the Jurisdiction.

The following cases are believed to sustain the jurisdiction of this court:

Great Northern Ry. Co. v. *State of Minnesota,* 278 U. S. 503;

King Manufacturing Co. v. *City Council of Augusta,* 277 U. S. 100;

Sultan Ry. Co. v. *Dept. of Labor,* 277 U. S. 135;

Bryant v. *Zimmermann,* 278 U. S. 63, 67;

Puget Sound Power & Light Co. v. *City of Seattle,* 291 U. S. 619;

Pacific Telephone & Telegraph Co. v. *City of Seattle*, 291 U. S. 300;

Weston v. *City Council of Charleston*, 27 U. S. 449, 2 Pet. 449.

We respectfully submit that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 237(a) of the Judicial Code.

Respectfully submitted,

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(7005-C)